

On appeal appellant's attorney contends that OWCP and the employing establishment have not addressed appellant's claim that her light-duty administrative position was changed when she was offered a new airport position and, therefore, the Board should accept the claim for a recurrence.

FACTUAL HISTORY

The case was previously before the Board.² Appellant filed a claim for a recurrence of total disability commencing February 25, 2009 alleging that she had been reassigned from an administrative position back to a limited-duty airport position³ due to retaliation for missing work to undergo psychiatric treatment of a nonemployment-related condition. The Board found that there remained unresolved discrepancies regarding the nature of the administrative position, and remanded the case for further development. The facts of the case, as set forth in the prior decision, are incorporated by reference.

In a January 28, 2010 report, Dr. Leonard Jaffe, an orthopedic surgeon, diagnosed adhesive capsulitis impingement and opined that appellant had reached maximum medical improvement. He advised that she was capable of working full time with the following permanent restrictions: five minutes of reaching, then rest; no reaching above the shoulder; no repetitive elbow or wrist movements; no pushing, pulling or lifting.

In June 23, 2011 letters to appellant and the employing establishment, OWCP requested information about the limited-duty assignment at the time of the claimed recurrence of disability. By letters dated July 25, 2011, it allotted 15 days for a response. Neither the employing establishment nor appellant provided any further evidence.

By decision dated August 12, 2011, OWCP denied appellant's claim for a recurrence of total disability finding that the evidence submitted was insufficient to establish a change in the nature and extent of the light-duty job requirements or a change in the nature and extent of the employment-related condition. Appellant had been working in a limited-duty capacity since June 8, 2008 in an office setting within her medical restrictions. On March 29, 2009 she was offered an amended limited-duty assignment as exit lane monitor within her medical restrictions due to a business necessity of the employing establishment. Appellant did not accept the job offer.

On August 24, 2011 appellant, through her attorney, requested an oral hearing before an OWCP hearing representative and submitted an August 10, 2011 narrative statement indicating that appellant had been placed on limited duty in an administrative position entering data on a computer where she did not have to put any strain on her arm. Appellant indicated that her

² Docket No. 10-1739 (issued May 25, 2011). OWCP accepted that on July 6, 2005 appellant, then a 49-year-old transportation security screener, sustained right shoulder and arm sprain.

³ The employing establishment offered a limited-duty position on March 20, 2009 as an addendum to the transportation security officer position that was accepted by appellant on May 15, 2009. The duties included: exit lane monitor, identification verifier/ticket checker, que monitor, divesture, recomposure and other customer service oriented positions as in assisting passengers' questions. Appellant was required to adhere to her medical restrictions of no lifting/carrying, pulling or pushing and no reaching over the shoulder.

limited-duty assignment had been changed to an exit lane monitor at the airport where she was to sit at the exit lane. She argued that even though this position was written as being within her current physical restrictions, it was in fact much more physically demanding and required detaining people who breeched security.

In two undated reports, Dr. Oscar Sandoval, a psychiatrist, diagnosed a head concussion on February 25, 2009 from which appellant developed headaches, anxiety, panic attacks and insomnia. He opined that appellant was not emotionally able to perform the job duties required at the airport where she would be required to give directions, respond to inquiries from the public, work in a stressful environment which included alarms, machinery, distractions, time pressure and angry passengers, and where she would be required to identify and locate potentially life-threatening devices and devices intended to create mass destruction. Dr. Sandoval recommended that appellant continue in her office position.

A hearing was held *via* telephone before an OWCP hearing representative on December 14, 2011. Appellant testified that she was not able to perform the duties of the airport position as she would not be able to physically stop a breach of security and argued that the position would violate the employing establishment's policies against 30-minute rotations. The hearing representative held the case open for 30 days for the submission of additional evidence.

By decision dated February 13, 2012, an OWCP hearing representative affirmed the August 12, 2011 decision finding that appellant sustained a nonemployment-related injury causing her disability for 10 days commencing February 25, 2009 and that a light-duty position was available to her within her work restrictions. The hearing representative noted that appellant's desire to work in a particular position was not a valid basis for a recurrence of disability.⁴ She also noted that the job offer did not indicate that appellant would be required to restrain anyone in an emergency and appellant provided no evidence that it violated the employing establishment's policy.

On March 20, 2012 appellant requested reconsideration and submitted a March 15, 2012 narrative statement by appellant reiterating her previous statements.

By decision dated April 4, 2012, OWCP denied appellant's request for reconsideration of the merits finding that she did not submit pertinent new and relevant evidence and did not show that OWCP erroneously applied or interpreted a point of law not previously considered by OWCP.

LEGAL PRECEDENT -- ISSUE 1

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.⁵ This term also means an inability to work that takes place when a light-duty

⁴ See *Samuel F. Mangin, Jr.*, 42 ECAB 671 (1991).

⁵ 20 C.F.R. § 10.5(x). See *T.S.*, Docket No. 09-1256 (issued April 15, 2010).

assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force) or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.⁶

When an employee who is disabled from the job she held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that she can perform the limited-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and to show that she cannot perform such limited-duty work. As part of this burden, the employee must establish that she was no longer able to perform the duties of the position due to either a change in the nature and extent of the injury-related condition or a change in the nature and extent of the limited-duty job requirements.⁷

A person who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which she claims compensation is causally related to the accepted injury. This burden of proof requires that a claimant furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.⁸

ANALYSIS -- ISSUE 1

Appellant returned to work in a limited-duty assignment as a transportation security officer on May 15, 2008. She began working in a limited-duty capacity in an office setting on June 8, 2008. She claims a recurrence of total disability beginning February 25, 2009 as a result of her July 6, 2005 employment injury. Appellant must show that she was no longer able to perform the duties of the position due to either a change in the nature and extent of the injury-related condition or a change in the nature and extent of the limited-duty job requirements.

Appellant has alleged that her administrative light-duty assignment was withdrawn in retaliation for her leave of absence due to a nonemployment-related injury and treatment thereof. The Board finds that the record establishes the administrative position was not withdrawn due to retaliation but out of a business necessity. The Board further finds that the evidence does not establish that appellant is medically incapable of performing the duties of the position due to a change in the nature and extent of appellant's light-duty job requirements. The physical requirements of the exit lane monitor and those of the administrative position were the same.

⁶ *Id.*

⁷ See *A.M.*, Docket No. 09-1895 (issued April 23, 2010). See also *Joseph D. Duncan*, 54 ECAB 471, 472 (2003); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

⁸ See *B.B.*, Docket No. 09-1858 (issued April 16, 2010). See also *Robert H. St. Onge*, 43 ECAB 1169 (1992); *Dennis J. Lasanen*, 43 ECAB 549 (1992).

In his reports, Dr. Sandoval diagnosed a head concussion on February 25, 2009 from which appellant developed headaches, anxiety, panic attacks and insomnia. He opined that appellant was not emotionally able to perform the job duties required at the airport and recommended that appellant continue in her office position. On January 28, 2010 Dr. Jaffe diagnosed adhesive capsulitis impingement and advised that appellant was capable of working full time with the following permanent restrictions: five minutes of reaching, then rest; no reaching above the shoulder; no repetitive elbow or wrist movements; no pushing, pulling or lifting. Although Dr. Sandoval suggested a change in the appellant's ability to perform the duties of the exit lane monitor, he explicitly indicated that the medical condition supporting his finding was a nonemployment-related condition. Although Dr. Sandoval recommended continued work in an office position, neither he nor Dr. Jaffe indicated a particular change in the nature of appellant's physical condition arising from the employment injury, which prevented her from performing the light-duty airport position.⁹ Therefore, appellant did not meet her burden of proof to establish a claim.

On appeal appellant's attorney contends that OWCP and the employing establishment have not addressed appellant's claim that her light-duty administrative position was changed when she was offered a new airport position and, therefore, the Board should accept the claim for a recurrence. For the reasons stated above, the Board finds that appellant has not established that she was no longer capable of performing the exit lane monitor position due to her accepted shoulder condition.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA does not entitle a claimant to a review of an OWCP decision as a matter of right; it vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.¹⁰ OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).¹¹

To require OWCP to reopen a case for merit review under section 8128(a) of FECA, OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.¹² To be entitled to a merit review

⁹ See *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value); *Jimmie H. Duckett*, 52 ECAB 332 (2001).

¹⁰ 5 U.S.C. § 8101 *et seq.* Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. 5 U.S.C. § 8128(a).

¹¹ See *Annette Louise*, 54 ECAB 783, 789-90 (2003).

¹² 20 C.F.R. § 10.606(b)(3). See *A.L.*, Docket No. 08-1730 (issued March 16, 2009).

of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.¹³ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.¹⁴

ANALYSIS -- ISSUE 2

In support of her March 20, 2012 reconsideration request, appellant submitted a narrative statement dated March 15, 2012. The two page dated statement is a recitation of her claim restating her arguments that she had previously made. The Board notes that submission of this statement did not require reopening appellant's case for merit review. As OWCP denied her claim based on the lack of supportive medical evidence and her narrative statement merely reiterates factual history of record, appellant's statement is not relevant and pertinent and is not sufficient to require OWCP to reopen her claim for consideration of the merits.¹⁵

Appellant did not submit any evidence to show that OWCP erroneously applied or interpreted a specific point of law, nor did she advance a relevant legal argument not previously considered by OWCP. As she did not meet any of the necessary requirements, appellant is not entitled to further merit review.

CONCLUSION

The Board finds that appellant failed to meet her burden to establish that she sustained a recurrence of total disability commencing February 25, 2009 causally related to a July 6, 2005 employment injury due to lack of medical evidence. The Board further finds that OWCP properly refused to reopen appellant's case for further reconsideration of the merits pursuant to 5 U.S.C. § 8128(a).

¹³ 20 C.F.R. § 10.607(a).

¹⁴ *Id.* at § 10.608(b).

¹⁵ *See James W. Scott, 55 ECAB 606 (2004).*

ORDER

IT IS HEREBY ORDERED THAT the April 4 and February 13, 2012 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 6, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board